United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

74-1860

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P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 74-1869

UNITED STATES OF AMERICA,

Appellee,

-v.-

GEORGE STOFSKY, AL GOLD, CHARLES HOFF
and CLIFFORD LAGEOLES,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF ON BEHALF OF APPELLANTS CHARLES HOFF and CLIFFORD LAGEOLES

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Appellants rely for the main part on the arguments and factual analysis set forth in the previous briefs submitted on their behalf and on behalf of appellants Stofsky and Gold. Several salient issues require re-emphasis and reply, however; we address those issues herein.

I

The Motions For A New Trial Should Have Been Granted

The government argues (1) that defendants are barred from raising the new trial issues because they failed to exercise "due diligence" at trial; (2) that it breached no obligation under Brady v. Maryland, 373 U.S. 83, and its progeny, and therefore that none of the Brady new trial standards are applicable here; (3) that the district court was correct in applying the "strict" standard to judge the motions for new trial; and (4) that the motions for new trial were properly denied pursuant to that strict standard. We address here the latter two contentions; the issue of "due diligence" is discussed in the reply brief for appellants Stofsky and Gold, in which we join. The Brady question was discussed at length in appellants' prior briefs, upon which we rely. 1/

1/ We reemphasize that we do not assert that the government has a duty to investigate the finances and Internal Revenue Service files of all witnesses it may call at criminal trials. Rather, we argue that, in the context of a case such as this, where the government relies on a single witness, where the case involves matters of financial manipulation and alleged bribery, and where the finances of the government witness are of crucial importance to the jury's evaluation of the case, the government has a duty to examine its IRS files and to

A. The Proper Standard for a New Trial In the Absence of Intentional or Inadvertent Suppression of Evidence By The Government

The government argues that the "settled state of the law in this Circuit" requires application of the "strict new trial standard" first enunciated in Berry v. Georgia, 10 Ga. 511, [2] in all cases except those in which there has been intentional or inadvertent suppression of evidence by the government (Govt. Br. at 69). [3] In so arguing, the

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1/ (Cont'd.)

disclose potentially exculpatory or relevant material therein. This is especially so when, as here, the government offers its witness transactional immunity; before granting such immunity, the government has an obligation to make a full investigation of the truth of his story and to uncover evidence which may indicate he is manufacturing testimony so as to gain the advantages of the immunity grant.

Finally, the government's obligation to investigate its witness certainly attaches before the United States Attorney vouches for the essential truth of the witness's testimony as to his financial affairs and gives "expert" testimony tending to rehabilitate the testimony of the government witness. See post at 10, 11 and n. 8.

2/ I.E., whether the new evidence probably would produce an acquittal at a new trial. See HL Supp. Br. at 19.

3/ References to "Govt. Br." are to the Government Brief. References to "HL Br." and "HL Supp. Br." are to the Brief on Behalf of Hoff and Lageoles and the Supplemental Brief on Behalf of Hoff and Lageoles, respectively. References to "SG Br." and "SG Supp. Br." are to the Brief on Behalf of Stofsky and Gold and the Supplemental Brief on Behalf of Stofsky and Gold, respectively.

government misstates the law of this circuit, ignores the clearly expressed views of the Supreme Court, and utterly fails to analyze the issue on its merits.

That the law in this Circuit on the applicability of the strict Berry standard is at best unsettled was made clear in appellants' supplemental brief (HL Supp. Br. at 19, 22-26). There we noted that an exception to the Berry standard had long been followed in this and other courts of appeals in cases in which there was a recantation by a material witness or where the new evidence proved that such a witness gave false testimony at trial. Under that exception -- stated in Larrison v. United States, 24 F.2d 82, 87 (7th Cir. 1928), -- a new trial must be granted if the newly discovered evidence might have produced a different result at the first trial. See also United States v. Johnson, 142 F.2d 588, 591-592 (7th Cir. 1944), cert. dismissed, 323 U.S. 806; United States v. Hiss, 107 F. Supp. 128, 136 (S.D.N.Y. 1952), aff'd., 201 F.2d 372 (2d Cir. 1953), cert. denied, 345 U.S. 942; Gordon v. United States, 178 F.2d 896 (6th Cir. 1949); United States v. Polisi, 416 F.2d 573, 577 (2d Cir. 1969).

While it is true that in United States v. DeSapio, 435 F.2d 272 (2d Cir. 1970), cert. denied 402 U.S. 999, this

court stated in an offhand dictum that it was "inclined" to the view that the Larrison rule was meant to be applied only in cases of government misconduct, id, at 286, n. 14, that dictum heretofore never has been followed as the basis for decision in any case before this or any other court. 4/ And, as we further noted in our supplemental brief, such a restriction of Larrison finds no historical support and makes no sense as a doctrinal matter (HL Supp. Br. at 23-26). 5/

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4 / The government's reliance on United States v. Marquez, 363 F. Supp. 802, 806 and n. 15 (S.D.N.Y. 1973), aff'd 490 F.2d 1383 (2d Cir. 1974), and United States v. Rosner, 516 F.2d 269 (2d Cir. 1975) is misplaced. In Marquez, Judge Weinfeld merely noted, somewhat quizzically, the Court of Appeals' "suggest[ion]" in the DeSapio dictum; Judge Weinfeld held, however, that a new trial was not warranted no matter what standard was applicable. 363 F. Supp. at 808.

In Rosner, the district court found inadvertent government suppression of material evidence, and applied the test of United States v. Miller, 411 F.2d 825, 826 (2d Cir. 1969) to the defendant's motion for a new trial. As we have note elsewhere (HL Supp. Br. at 23-24), the Miller test is considerably more liberal than even the Larrison test: Rosner quite understandably did not request that the Larrison test should be applied to his case. Rosner in effect argued that in his case the perjured testimony and the alleged government misconduct ipso facto should result in a new trial, as in Brady v. Maryland, 373 U.S. 83. The Rosner Court's comment that "Perjury by a government witness, unknown to the prosecution, does not ordinarily compel the application of standards for a new trial required in cases of government misconduct", 516 F.2d at 579 merely recognizes that perjury by a government witness does not give rise to a Brady standard. It does not address the question of the applicability of the less liberal Larrison standard, urged here.

5 / Among other matters, appellants noted that the Larrison

It ignores the deep-seated policy reflected in Larrison and having roots in the Fifth and Sixth Amendments that a person should not be convicted on such "tainted" testimony. Mesarosh v. United States, 352 U.S. 1.

The government's effort to distinguish the Mesarosh case (Govt. Br. at 70) is superficial and conclusory. While Mesarosh indeed was in some ways an unusual case, it is well to consider the core principles upon which all parties and justices agreed and from which the case proceeded. Analysis of these principles reveals that, at the least, the Larrison rule must govern here.

In Mesarosh, evidence developed while the case was pending on certiorari before the Supreme Court that Mazzei, a government witness at trial, had lied at several subsequent proceedings. The new evidence did not show that Mazzei actually had committed perjury at Mesarosh's trial, nor did the government admit that he had. Thus, the new evidence did not by itself trigger the Larrison standard. Accordingly, the govern-

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5/ (Cont'd.)

standard developed before the full enunciation of the Brady doctrine and its progeny, and that the Larrison standard is inappropriate for cases of prosecutorial suppression of evidence because it does not provide enough prophylactic protection against such abuses.

ment, in revealing the new evidence to the Supreme Court, moved for a remand to the district court so that a hearing could be had to determine whether Mazzei had committed perjury at trial. Cf., United States v. Flynn, 130 F. Supp. 412, (S.D.N.Y. 1955). If upon remand it was found that perjury had been committed, the government agreed that, with respect to two of the defendants, an order of acquittal would have to be entered and, with respect to the remaining defendants, a new trial would be required if the trial judge had any "doubt in his mind" whether the perjured testimony had affected the jury's verdict. 352 U.S. at 24, n. 11 (Harlan, J., dissenting). Thus, all parties to Mesarosh agreed, at a minimum, that a new trial would be required if it could be shown that perjury in fact had been committed by a government witness at trial and that such perjury might have affected the jury's verdict. The dissenting justices similarly were in accord.

The Court rejected the government's suggestion to remand and instead itself ordered a new trial. It was this aspect of the Mesarosh Court's decision that was unusual and perhaps sui generis. The Court justified its order, in the absence of hard evidence that Mazzei had lied at trial, on its view that he was a compulsive liar and perjurer and that it would be fairly impossible to determine for certain whether or not he

had lied at trial. Rather than remand for what it believed would be a useless procedure, the Court, in effect, presumed that Mazzei had lied at trial. Once having made that finding, it ordered a new trial because it deemed that the new evidence might have affected the jury's verdict with respect to each defendant.

The instant case in no way requires this court to engage in the presumptions found necessary in Mesarosh. Here, unlike Mesarosh, there is no doubt of massive perjury by a government witness at and subsequent to trial. Here, unlike Mesarosh, that government witness (Glasser) is the only witness to implicate at least two of the defendants (Hoff and Lageoles) in a criminal scheme. Thus, this case falls within the common ground held by all parties and all justices in Mesarosh: A new trial is required, at the least, if the new evidence might have produced a different result at the trial.[6/]

6/ That the Mesarosh Court approved the application of the Larrison standard to cases where it is shown that a material witness recanted or committed perjury is made clear by its discussion of the matter, 352 U.S. at 12, and n. 6. There the Court, while finding it unnecessary to discuss the procedure to be followed in determining as a matter of fact whether such a recantation is genuine or whether perjury was committed, noted the difference between the standard to be applied on ordinary new trial motions and on motions where such a factual basis has been established. The Court cited with approval the Seventh Circuit's opinion in United States v. Johnson, supra, and the decision of the Southern District of New York, affirmed by this Court, in United States v. Hiss, supra. Both Johnson and Hiss elucidated the distinction between Berry and Larrison new trial motions, and fully support appellants' position here.

Accordingly, as appellants argued in their supplemental brief, this court's offhand dictum (or inclination) as expressed in footnote 14 of its DeSapio opinion cannot withstand close analysis. The court should return to the two-tiered rule it previously enunciated in cases such as Polisi, Miller, and Hiss -- a rule to which the Supreme Court itself has lent its sanction based in no small part upon this court's earlier expressed views.

B. The evidence of Glasser's massive perjury requires a new trial pursuant to any standard.

The government persists in arguing that the evidence of Glasser's perjury does not mandate a new trial mainly because Glasser's latest explanation, if accepted as true, would further implicate the defendants in alleged criminal activity. But this view inexplicably overlooks the very fact of Glasser's pattern of repeated perjury and the obvious effect its revelation would have on a jury. When viewed in light of the cynicism with which members of the first jury viewed Glasser's credibility even in the absence of such evidence of perjury,[7/] it blinks reality to assert that Glasser's latest

7/ I.e., their inability to reach a verdict on the "Glasser" counts until being given an "Allen" charge.

version of the "truth" would be swallowed whole by a new (or the old) jury.

The major thrust of the government's argument is (1) to downplay the importance that the issues of Glasser's finances and credibility played at the first trial, and (2) to emphasize the "independent" evidence which "corroborated" Glasser's version of the alleged truth. Both efforts are futile.

With respect to the first point, nothing the government may suggest now can erase the obvious importance that all parties and the court placed on those two issues throughout the proceedings. The United States Attorney stressed the importance of the role of Glasser's finances, and even improperly induced the district court to allow him to call Mrs. Glasser as a witness on the government's main case to testify (falsely) solely on that issue (173a, et seq.).

Similarly, during summation the prosecutor in effect gave "expert" legal testimony on the meaning and interpretation of the Glassers' story of their inheritance, "evidence" which was untrue and without a basis in the record, but which undoubtedly carried great weight with the jury in rehabilitating

the Glassers' testimony. [8]

The summation also emphasized the motive of the defendants to lie, as opposed to the asserted lack of motive for Glasser to lie (627a), an argument which was false and which could never be made in the face of the new evidence. And the court's charge to the jury again stressed the crucial role of the twin questions of Glasser's finances and credibility (671a).

As to the "independent" evidence, there simply is precious little, if any, which corroborates Glasser on material and important aspects of his testimony, especially with respect to defendants Hoff and Lageoles. Rather, there is considerable "independent" evidence which supports the defendants' version of what did and did not happen; in the light of the evidence of Glasser's massive perjury, it is quite likely that a jury would consider <u>that</u> evidence in a much more favorable light.

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[8] The government's claim (Br. at 73, n. *) that it "virtually conceded" that the Glassers' story of the inheritance was not true is quite obviously belied by even a cursory reading of the record (628a); we merely refer the court to that passage so that it may judge for itself its probable effect upon a jury.

The independent evidence relied upon by the government is basically the same as that relied upon by the district court and discussed in appellants' supplemental brief (HL Supp. Br. at 33-34). Thus, while Daniel Ginsberg testified that he gave money to Glasser, he further testified that he had no idea whether Glasser gave money to union officials; moreover, Ginsberg's testimony (and Glasser's testimony with respect to the Ginsberg counts) did not implicate Hoff or Lageoles in the receipt of money. Similarly, neither Walter Stiehl nor Daniel Grossman testified in any manner whatsoever that he had made payments to Hoff or Lageoles. [9] The government refers to evidence of the "unusually favorable" treatment afforded to the manufacturers who allegedly were making payoffs. But the government's evidence does not indicate whether the treatment was unusual or not; there is no proof that more severe treatment was accorded to other manufacturers

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[9] Grossman's testimony as to Hoff's participation in two meetings did not indicate that Hoff had accepted any money or was aware that others had; moreover, this testimony is suspect in light of the jury's acquittal of Hoff (and Lageoles) for conspiracy with the purpose of violating the Crime Control Act.

for similar contracting or jobbing violations. Indeed, the only evidence presented on this issue indicated that the treatment was not unusual, because of the huge and largely impossible job of policing and enforcing the contracting, jobbing, and overtime provisions of the collective bargaining agreement. Not only did defendants Hoff and Stofsky testify to this effect, but the government's own witness, Reiss, testifying with respect to the Ginsberg jobbing and contracting violations, stated that the usual and appropriate sanction would be a mere warning (20[illegible]).

The government conveniently ignores or downplays other independent evidence which corroborates the defendants' accounts and which undoubtedly would be favorably received by a jury with knowledge of Glasser's habitual perjury. Thus, there was the contracting complaint filed against Sherman Brothers on January 10, 1968, resulting in a $200 fine; the strike against Schwartzbaum and others in May, 1969 for jobbing, resulting in a fine to Schwartzbaum of $400; the fact that Hoff initiated an investigation of Ginsberg after inadvertently discovering evidence of Ginsberg's contracting while he (Hoff) was on a trip to California; and finally the fact that it was Lageoles himself who filed the contracting complaint against

Sherman Brothers on August 6, 1970 which led to Glasser's downfall and his effort to implicate Lageoles, Hoff and the other defendants in his illicit schemes.

In the light of this independent evidence of the proof of Glasser's perjury, and the utter lack of any other evidence implicating Hoff or Lageoles in pay-offs, appellants submit that there can be no other course but to order a new trial.

POINT II

The Indictment Was Invalid Because Returned After the Grand Jury's Lawful Life Had Expired

The government first argues that Judge Bonsal's instructions to the grand jury satisfies the Organized Crime Control Act of 1970. The contention flies in the face of the clear provisions of 18 U.S.C. §3331(a) establishing that the order convening the grand jury is alone material.[10] The contention is also contrary to United States v. Fein, 504 F.2d 1170 (2d Cir. 1974) and Wax v. Motley, 510 F.2d 318 (2d Cir. 1975). In Fein, this court rejected the contention that a grand jury could be "converted" into a §3331 grand jury, 504 F.2d at 1179-1180. And in Wax the inquiry focused exclusively on the "original intention", 510 F.2d at 321, of the convening judge.[11] See also United States v. Macklin,

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10/ In relevant part, §3331(a) provides:

> "In addition to such other grand juries as shall be called from time to time, each district court ... shall order a special grand jury to be summoned ...."

11/ The government repeatedly quotes a portion of a sentence in Wax for support of its contention: "what sort of grand jury actually had been empanelled", 510 F.2d at 320. Ambiguous on its face, not addressed to the issue at hand and made in the context of the exclusive focus being upon the convening judge's "original intention", the quotation is of no assistance to the government.

Dkt. No. 75-1189 (2d Cir. Sept. 4, 1975), Slip. Op. 5911, 5912.

However, we need not reach the question whether a §3331 grand jury can ever be created by actions of the empanelling (as opposed to the convening) judge. There is not the slightest evidence that Judge Bonsal intended to exercise any powers under §3331(a) to create a special grand jury. On the contrary, it clearly appears that Judge Bonsal merely understood that the grand jury which he was instructing had been convened as an Organized Crime Control Act grand jury (A112-123). Presuming that the government is even mindful of the distinction, it has pointed to nothing in the record to support the former conclusion.[12/]

The distinction is fatal to the government's contention. The Act is not self-executing. A conscious judicial decision that a §3331 grand jury should be created is required. Even when a special grand jury must be convened under the mandatory provision of §3331(a), there must be a conscious judicial decision as to which grand jury should be so convened.

12/ Contrary to the government, Govt. Br., p. 83, defendants have never conceded otherwise. Defendants clearly stated, HL Supp. Br., p. 38: "Judge Bonsal's instructions to the grand jury made clear his understanding that a §3331 grand jury had been convened (A-112 et seq.)" (emphasis in original).

Indeed, the judicial decision required by the Act is of considerable importance to the entire statutory scheme. Congress created the §3331 grand jury, with its distinctive and greatly augmented powers, for the particular purpose of combating organized crime. It sought to limit the number of those special grand juries to what was necessary for that purpose and to confine those grand juries to organized crime investigations. Congress could not, however, limit the applicability of the Act by specifically defining the type of criminal conduct which the special grand jury would be authorized to investigate; the phrase "organized crime" proved too ambiguous for satisfactory definition. See United States v. Fein, 504 F.2d at 1180. Thus, whether a §3331 grand jury was necessary and appropriate for a particular proposed investigation or generally was entrusted to the informed discretion of the district court. The one attempt in the legislative history to displace the court's discretionary authority in the creation of special grand juries was strongly

and successfully opposed.[13/]

13/ As passed by the Senate, the provision of S.30 regarding the convening of an additional special grand jury lodged the decision in the existing §3331 grand jury. Upon a majority vote of the members of the existing §3331 grand jury that the volume of business before it exceeded its capacities, the grand jury could make an application to the court for the convening of an additional §3331 grand jury. Upon such an application and a "showing of need" the court was required to convene the additional grand jury. See S.30, §3332(c) in Hearings, Comm. on the Judiciary, House of Representatives, 91st Cong., 2d Sess. (May 20, 1970), p. 5.

Chief Judge Kaufman communicated the Judicial Conference's opposition to the displacement of the Court's role, explaining that the provision rested on the:

> "unstated assumption that the grand jury is better able to determine the proper length and scope of investigations into criminal activities than is a federal court. The Committee found itself unable to accept the theory that a grand jury functions best when supervised least...."

House Hearings, supra, p. 124. Accordingly, Congress amended the provision, enacted as §3332(b), so as to rest in the court the responsibility for determining whether an additional §3331 grand jury should be convened. The House Judiciary Committee, which amended S.30 in accordance with the recommendations of the Judicial Conference, noted, House No. 91-1549, 91st Cong., 2d Sess. (Sept. 30, 1970), p. 32: "As amended by the Committee, the bill would require such grand juries to be subject to the control of the district court..."

Similarly disregarding the need for a judicial decision, the government also argues that the prosecutor intended the grand jury to be a §3331 grand jury and that the grand jury was treated and functioned as such in that orders were entered pursuant to the Act extending the grand jury's life and the grand jury in fact investigated "organized criminal activity". These are exactly the same contentions rejected as irrelevant by this court in Fein, 504 F.2d at 1179. They must be rejected here for precisely the same reason: The prosecutor's intent and the practice of the grand jury do not substitute for the judicial decision required by the Act.

The government's alternative contention is that the late Chief Judge Sugarman intended to convene a §3331 grand jury. In arguing the evidence, the government simply ignores the standard of proof it must meet under Wax. Further, its exploration of the record only confirms that the Wax, or even a lesser standard of proof cannot be met on the facts here. See also our original discussion, HL Supp. Br., pp. 36-53. Accordingly, only a few additional comments need be me in reply.

The government makes an entirely circumstantial argument, contrary to Wax. It does more, however, It asks

this court to indulge in unabashed speculation and worse. Thus, the government's "proof" that Judge Sugarman even knew that the Strike Force desired the convening of a §3331 grand jury is nothing but an invitation to speculate as to what Judge Sugarman himself "could properly have ... inferred" about the Strike Force's intentions, Govt. Br., p. 85.

Similarly, the government argues that since §3331 required that at least one special grand jury be convened prior to April 15, 1972, and that this is the only grand jury which was "arguably so summoned", Govt. Br., p. 87, the grand jury must have been convened as such. In the first instance, we have no way of knowing whether other grand juries were "arguably so convened", given the failure of the United States Attorney's Office to draft suitable orders and applications. More fundamentally, however, we are asked to assume without the slightest evidence that Judge Sugarman not only knew of the Act's existence but understood its requirements and unilaterally took this occasion to conform the district court's conduct thereto. The government is not so much arguing circumstantial evidence insufficient as a matter of law under Wax, but a presumption of regularity even more squarely contrary to Wax, if possible, and wholly contrary to the known experience with the Act. See HL Supp. Br., pp. 43-44.

Finally, we note that defendants Hoff and Lageoles adopt the other defendants' arguments concerning the late filing of the April 22, 1973 extension order. See SG Supp. Br., pp. 19-20.

III

A Single Conspiracy Was Not Established In The Court Below

The record below, as the main Stofsky Brief shows so well (SG Br. at 52-53), established fourteen separate agreements - if it established any. Hoff and Lageoles were not linked to payments allegedly made by employers to other union officials; the record failed to show any knowledge on their part of such alleged payments, much less participation.

A single agreement among the four defendants, Glasser, and the various manufacturers cannot be assumed unless the government has eliminated each and every hypothesis which might support independently determined actions. See Pevely Dairy Co. v. United States, 178 F.2d 363, 370 (8th Cir. 1949); Paul v. United States, 79 F.2d 561, 563 (3d Cir. 1935); United States v. Morgan, 118 F.Supp. 621, 633 (S.D.N.Y. 1953). Instead of eliminating such hypotheses, the government, through Glasser, presented a witness who attested to the individuality of his approaches. It is absurd to assume, as did the Court below, that because the four defendants were union officials in a small industry, engaged in constitutionally

and statutorily protected rights of association, they conspired together to violate the criminal laws.

This is particularly true of Hoff and Lageoles, against whom no employer appeared as a direct witness, whom the jury at first hesitated to find guilty of any substantive charge and whom the jury found to be outside the conspiracy to violate the Crime Control Act.[14]

Indeed the jury's special findings on the purposes of the conspiracy support the conclusion that there could not be a single conspiracy. One group of defendants was found guilty of a conspiracy to violate two statutes; another group (Hoff and Lageoles) was found guilty of a conspiracy to violate a single statute. That is the antithesis of a single conspiracy, which involves an agreement by all the conspirators to commit crimes to which all prescribe even though the responsibilities for commission of particular substantive crimes (the objectives of the conspiracy) are assigned or undertaken

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[14] No substantive crime against Hoff and Lageoles subsequent to passage of that statute is charged in the indictment.

by the different conspirators. While individuals may join a conspiracy at different times [15] the agreement must be one with identical objectives. See United States v. Peoni, 100 F.2d 401 (2d Cir. 1938); La Fave & Scott, Criminal Law (1972), p. 464; United States v. Spock, 416 F.2d 165, 179 (1st Cir. 1969); Daily v. United States, 282 F.2d 818 (9th Cir. 1960).

The prejudicial effect upon Hoff and Lageoles in this case is quite obvious. Had they been tried properly in separate trials for conspiracy with Glasser to violate 29 U.S.S. § 186, and for the related substantive crimes of bribery and tax evasion, only Glasser would have testified against them and they would not have been encumbered by the charges against Stofsky and Gold. These latter charges were prejudicial because: (1) the indictment charged much more criminal behavior than was charged against Hoff and Lageoles; (2) the crimes were more serious and different: racketeering and corruption of justice; (3) the witnesses included employers who arguably could buttress Glasser at least with respect to his testimony against other defendants,

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15/ See United States v. Sobell, 314 F.2d 314, 329 (2d Cir. 1963).

Stofsky and Gold; (4) the accumulation of evidence gave a picture of corruption permeating the entire industry. Clearly the prejudice here was as marked as in Kotteakos v. United States, 308 U.S. 750, 769, and more injurious to Hoff and Lageoles because of the elements admissable in a criminal case against their co-defendants and unrelated to their own case.

CONCLUSION

The convictions of appellants Hoff and Lageoles should be reversed and the indictments should be dismissed. In the alternative, the case should be remanded to the district court for a new trial. Finally, if a new trial is ordered, Hoff and Lageoles should be tried separately and only for the lesser individual conspiracies warranted by the government's evidence at the first trial.

Respectfully submitted,

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